IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,
Petitioners,

vs.

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF VIETNAM, and THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES,
Respondents.

MOTION OF THE FEDERAL REPUBLIC OF GERMANY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*

Of Counsel:
DR. F. FINGER
Ministry of Finance
Federal Republic of Germany
Martin-Luther-King-Str. 8
5300 Bonn
Federal Republic of Germany

PAUL C. SPRENGER
ERIC L. OLSON
700 First National Bank Building
Minneapolis, Minn. 55402

Attorneys for Amicus Curiae Federal Republic of Germany

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Pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, the Federal Republic of Germany hereby respectfully moves for leave of the Court to file the Brief annexed hereto as *amicus curiae* in this case.*

* Petitioners have refused consent to the filing of a brief *amicus curiae* by the Federal Republic of Germany. That refusal is reflected in a letter dated July 6, 1977, to Paul C. Sprenger, attorney for the Federal Republic of Germany, from Peter Dorsey, attorney for American Cyanamid Company, on behalf of petitioners.

The interest of the Federal Republic of Germany derives from its own substantial commercial activity in United States foreign commerce and from its role as a plaintiff in a coordinated *Antibiotic Antitrust Action* pending in the District of Minnesota. *Federal Republic of Germany, et al. v. Pfizer Inc., et al.*, D. Minn. Civil No. 4-74-614. The complaint in that action, also brought under Section 4 of the Clayton Act, 15 U.S.C. §15, contains allegations of injury sustained by the Federal Republic of Germany in its purchases of broad spectrum antibiotics as a result of conspiracy in restraint of trade and monopolization by petitioners violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2.

As a corporation under West German law, the Federal Republic of Germany will remain within the Clayton Act definition of "person" (15 U.S.C. §12) irrespective of the disposition of the question now before the Court as to whether "person" in Section 4 includes foreign nations generally. On December 27, 1975, upon denial of petitioners' motions to dismiss for lack of standing in cases now before this Court, the District Court observed with respect to the action which had been filed by German plaintiffs about a year earlier:

> "The parties (including defendant-petitioners) have indicated that special considerations may apply to the *Germany* case and thus defendants' motion to dismiss is not yet ready for decision." *Miscellaneous Order No. 75-49*, reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at E-4.

As a corporation and as a member of the European Economic Community having an active interest in antitrust enforcement, the Federal Republic of Germany possesses a status and perspective which permit it to present to the Court addi-

tional considerations bearing on the question here presented, including those relating to treaty obligations and to the inconsistent international application of the antitrust laws that would result from adoption of the exception to the scope of Section 4 of the Clayton Act which is being urged by petitioners. In this respect, the Federal Republic of Germany occupies a position unique and apart from that of the parties before the Court. This causes the Federal Republic to believe that its status, its treaty relationship with the United States, and attendant implications for the issue now before the Court will not be adequately presented by other parties. The future reciprocal remedies available to American and German entities under their respective antitrust laws are of manifest significance and importance to both nations and are directly relevant to the full consideration of the issue here presented. Further, the question to be reviewed involves a current and important area of antitrust law which is of substantial interest and concern to *amicus* as a litigant, as a foreign nation which in its proprietary capacity engages in United States foreign commerce, and as a nation which shares the antitrust philosophy of the United States. See, e.g., "Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices", T.I.A.S. No. 8291, September 11, 1976, unofficially reported in CCH Trade Reg. Reptr. ¶50,283.

WHEREFORE, the Federal Republic of Germany requests the opportunity to express its views and accordingly respectfully requests that the Court grant this motion for leave to

file the annexed Brief of the Federal Republic of Germany as *Amicus Curiae*.

Respectfully submitted,

PAUL C. SPRENGER
ERIC L. OLSON
700 First National Bank
Building
Minneapolis, Minn. 55402
Attorneys for Amicus Curiae
Federal Republic of
Germany

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BRIEF OF THE FEDERAL REPUBLIC OF GERMANY AS *AMICUS CURIAE*

THE QUESTION PRESENTED FOR REVIEW

Is a foreign nation a "person" within the meaning of that term as used in Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970)?

ARGUMENT

I. ADOPTION OF THE EXCEPTION URGED BY PETITIONERS WOULD RESULT IN ILLOGICAL APPLICATION OF THE ANTITRUST LAWS BECAUSE, *INTER ALIA*, THE FEDERAL REPUBLIC OF GERMANY IS A FOREIGN CORPORATION UNDER SECTION 1 OF THE CLAYTON ACT.

In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the United States asserted that it could be regarded as a corporation organized under its own laws and that it, therefore, was entitled to sue for antitrust damages as a consequence of that status. The Court disposed of that assertion in short shrift:

> "We may say in passing that the argument that the United States may be treated as a corporation organized under its own laws, that is, under the Constitution as the fundamental law, seems so strained as not to merit serious consideration." 312 U.S. at 607.

Whatever the merits of that argument as it related to the United States,[1] a similar contention made by the Federal Republic of Germany cannot, however, be lightly regarded.

The Federal Republic of Germany is a corporation under the laws of the Federal Republic of Germany. This point is not subject to doubt or dispute. Judgment of October 30, 1951,[2] BGHZ I E 3/309; Judgment of March 25, 1952,

[1] The Court's statement on this point in *Cooper* cannot, of course, constitute a finding or conclusion applicable to foreign nations generally or to any individual foreign nation, as neither that issue nor the relevant facts were then before it.

[2] Decisions in German law reports are not identified by the names of the parties.

Counsel for *amicus* will provide supplementary materials concerning any issue of German law or treaty relationships on which the Court may wish additional information.

BGHZ I ZR 109/51; Judgment of February 28, 1952, BGHZ IV ZR 157/50. German legal scholars record the same view. See, e.g., Maunz-Duerig, *Basic Law Commentary*, Art. 19 Abs. III, Anm. 31 ff; Stein-Jonas, *Civil Procedure Code*, §50 II 3, S.316 (1974); Wierzorek, *Civil Procedure Code*, §50, C II, S.352 (Bd. I, Part 1, 1957). As a corporation, the Federal Republic is capable of possessing rights and, under the German Civil Procedure Code, has both capacity to sue and corresponding susceptibility to be sued. Wierzorek, *Civil Procedure Code*, §50, C II, II a, II al (2. aufl., Bd. I, 1975/76), m.w.N.

Thus, the Federal Republic of Germany does not contend that it may be regarded or should be treated as a corporation, but, more simply, that it *is* a corporation under its own law,[3] a status which has been confirmed by official communique of its Ambassador to the District Court. And, as a corporation, the Federal Republic is squarely within the Clayton Act definition of "person" [15 U.S.C. §12 (1970)] and can be excluded from the set of those entitled to sue for damages only through complete disregard of the definitional section or by amendment thereof.[4]

[3] The same was true of the predecessors of the Federal Republic, both with regard to status as a corporation and capacity to sue and be sued. Judgment of October 4, 1880 RGZ IV E2/392; Judgment of March 25, 1889, RGZ IV E23/261 ff; Judgment of May 22, 1900, RGZ III 84/00; Judgment of January 28, 1905, RGZ V E59/400 ff; Judgment of March 15, 1912; RGZ III War. 257; Judgment of July 1, 1915, RGZ IV Warn. 253; Judgment of March 4, 1930, RGZ III JW 31.737-8; Stein-Jonas, *Civil Procedure Code*, §50 II ff.

The present entity was established by the Allied Powers — Russia, Great Britain, France and the United States — in 1949. See generally Zink, *The United States in Germany 1944-1955*, (D. Van Norstrand Co., Princeton) 1957; and Merkl, *The Origin of the West German Republic*, (Oxford University Press, New York) 1963.

[4] Thus, petitioners' belief that "the test of sovereign or corporate status" possesses "the virtue of clarity of application" and is a "sound basis for distinction" superior to the distinction between "commercial" and "governmental" activities is ill-founded. Joint Brief for Petitioners, p. 32.

The construction of Section 4 for which petitioners contend would produce an illogical and incongruous application of the remedial provisions of Section 4 of the Clayton Act to foreign nations. Those which, like the Federal Republic of Germany, are corporations under their own law, will be permitted to attempt to prove the elements of antitrust offenses and to establish resulting damages, while those nations which are not corporations will be foreclosed from attempting those tasks. This Court should be very slow to create, through statutory construction, such an unreasonable and illogical result. See, e.g., *United States v. American Union Transport*, 327 U.S. 437, 451 (1946).

The incongruity of application which would be produced by the decision being sought by petitioners is further exacerbated by the fact that foreign nations, through their governments, own or control many foreign corporations. See, e.g., *Amtorg Trading Corp. v. United States*, 71 F.2d 524, 528-9 (C.C.P.A. 1934). Since the standing of foreign corporations to sue for antitrust damages is indisputable, a decision generally excluding foreign nations from the protection of Section 4 would inevitably lead to questions concerning the point, if any, at which foreign nation ownership or control would disqualify a given corporation as an antitrust litigant.[5] (Complete ownership? 51% ownership? "control" ?) A German example which comes readily to mind is Lufthansa A.G., which, coincidentally, is currently a defendant in antitrust civil and criminal actions being prosecuted by the United States Department of Justice.

[5] If there were to be no such point, a different set of inequities would result as the better-informed foreign nations would begin conducting their international business through the expedient of shelter corporations.

If the determination of the courts below were reversed, the standing of a corporation in one nation might also come into jeopardy because of ownership by *another* nation. American corporations may find themselves disqualified as plaintiffs as a consequence of substantial investments made by other nations. The same applies to corporations outside the United States. For example, respondent Iran recently acquired a 25.01% interest in Krupp G.m.b.H., an industrial corporation in West Germany.[6] That an American or a German corporation in which its own government has no ownership interest may be denied a Clayton Act remedy because of partial or complete ownership by some *other* foreign nation, would constitute a strikingly unreasonable and bizarre application of law. Yet it is precisely this type of inquiry which would quickly follow a reversal of the decision of the courts below.

In contrast to the disarray in application of the law which would be the inevitable fallout of a decision excluding foreign nations from Section 4, an affirmation of their standing to seek recovery of damages resulting from United States antitrust offenses permits continued availability of the remedial provisions of the Clayton Act to all those who have been injured on a sensible and rational basis.

[6] Reported in *The Wall Street Journal*, Thursday, February 17, 1977, p. 8.

II. TO DENY THE FEDERAL REPUBLIC OF GERMANY AN ANTITRUST CIVIL DAMAGE REMEDY WOULD VIOLATE THE PROVISIONS OF ITS TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION WITH THE UNITED STATES.

The Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany[7] establishes:

> "mutual rights and privileges . . . based in general upon the principles of national . . . treatment reciprocally accorded".

Article VI(1) of the Treaty provides that:

> "Nationals and companies of either Party shall be accorded national treatment with respect to *access to the courts of justice* and to administrative tribunals and agencies within the territories of the other Party, *in all degrees of jurisdiction, both in pursuit and in defense of their rights.*[8] It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication." (emphasis added)

[7] 7 U.S.T. 1839, T.I.A.S. No. 3593 (1956).

[8] That antitrust matters were within the contemplation of the draftsmen of the Treaty is clear from a reading of Article XVIII (1), which sets forth the parties' agreement that:

> "business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories."

And, the Treaty defines "companies" to include all corporations without regard to their profit-making capacity or their "governmental" or "business" nature:

> ". . . corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party." Article XXV(5).

Further, the Treaty defines the "national treatment" to be accorded by the courts of the United States as:

> "the treatment accorded therein to the companies created or organized in . . . the United States of America." Article XXV(3).

Presently, in accord with these treaty provisions, the United States and its corporations have been reciprocally accorded "access to the (German) courts" for the purpose of pursuing antitrust claims. Act Against Restraints on Competition (BGBl. I. 1974, 869); *Civil Procedure Code*, ZPO §50(1). The Treaty assures the Federal Republic and other of its corporations of corresponding access to United States courts in pursuit of their antitrust claims.[9]

[9] Where the anticompetitive activity is orchestrated by United States companies from within the United States, jurisdictional and related practical limitations nearly always make illusory the prospects for successful pursuit of a claim under Germany antitrust law in a Germany forum. As is generally the case, legal action must, as a practical matter, be initiated against a defendant where it is found.

Conversely, with respect to the assertion of antitrust defenses, the Treaty makes clear that governmental entities cannot claim immunity from suit or judgment:

> "*No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall,* if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, *claim* or enjoy, either for itself or for its property, *immunity* therein *from* taxation, *suit, execution of judgment or other liability* to which privately owned and controlled enterprises are subject therein." Article XVIII (emphasis added).

Applying the foregoing treaty provisions to the question before the Court, it is clear that the Federal Republic of Germany must be permitted to litigate antitrust claims in United States federal courts. Treaties are the law of the land, and acts of Congress should not be construed to violate international law if any other possible construction remains.[10] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64,118 (1804); *MacLeod v. United States*, 229 U.S. 416 (1913). Here the "other possible construction" is the one which has the additional virtues of being in accord with the remedial purpose of Section 4 and the entire scheme of related antitrust statutes. It is that construction which was made by the courts below and which should be affirmed by this Court.

[10] Both the United States and the Federal Republic adopt international law as part of the general body of applicable law. *Kansas v. Colorado*, 206 U.S. 46 (1907); *Hilton v. Guyot*, 159 U.S. 113 (1895); *Skiriotes v. State of Florida*, 313 U.S. 69 (1941).

The Basic Law of the Federal Republic of Germany, 1949, Article 25, provides:

> "The general rules of public international law form part of the federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory."

III. FOREIGN NATIONS ARE "PERSONS" ENTITLED TO SUE UNDER SECTION 4 OF THE CLAYTON ACT, AS THE COURT OF APPEALS CORRECTLY DETERMINED IN LIGHT OF THE APPLICABLE DECISIONS OF THIS COURT.

Section 4 of the Clayton Act, 15 U.S.C. §15, provides a civil damage remedy to "*any person* who is injured in his business or property by reason of anything forbidden in the antitrust laws". (Emphasis added.) The words "any person" reflect the plain purpose of Congress to confer the remedy upon all those injured by any proscribed anticompetitive act or practice. The language, in keeping with the broad scope of related statutes[11] and the remedial purpose of Section 4, is expressly all-inclusive. Absent convincing evidence that Congress intended the contrary, all juristic persons must be regarded as within its coverage.[12] In only a single instance have special considerations been found to compel the conclusion that a particular entity, the United States government, was outside the scope of Section 4. *United States v. Cooper Corp.*, 312 U.S. 600 (1941).[13] Petitioners in the present case now seek a general exception to the coverage of Section 4 for foreign nations,

[11] See, e.g., the opening phrases of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. "Language more comprehensive is difficult to conceive." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

[12] See *Mandeville Island Farms, Inc. v. American Crystal Sugar Company*, 334 U.S. 219, 236 (1948), concerning Section 7 of the Sherman Act, 26 Stat. 210, the predecessor provision of Section 4 of the Clayton Act.

[13] Congress subsequently enacted a separate provision conferring a remedy for actual damages incurred. 15 U.S.C. §15a (1970).

without regard to the commercial nature of their activities or their status under law.[14]

Previous argument of the question before the Court has devoted substantial attention to *United States v. Cooper Corp.*, 312 U.S. 600 (1971) and *Georgia v. Evans*, 316 U.S. 159 (1942). While the two opinions appear at first blush to give rise to conflicting analogies, the decisions are both consistent with one another and with the *en banc* decision of the Eighth Circuit Court of Appeals in this case.

In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Court held that the United States government was not within the term "person" as used in the antitrust laws.[15] Congressional provision of manifold antitrust sanctions and remedies to the United States government exclusively, including capacity to institute criminal prosecutions and obtain injunctions to restrain violations, was found to reflect Congressional intent to exclude the United States government from the class of persons entitled to sue for civil damages. As the sole recipient of a collection of remedial and enforcement armaments, the United States government was intended by Congress to occupy a unique position in the statutory scheme.

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[14] No constitutional question is implied by the issue before the Court, as the jurisdiction of federal courts reaches "all Cases . . . (and) Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects". U.S. Const. Art. III, §2. Neither does the issue suggest an inquiry concerning antitrust jurisdiction. The commerce clause of the Constitution gives Congress vast power to legislate in the field of interstate and foreign commerce, and petitioners acknowledge that "Congress intended the Judiciary to define 'commerce' so as to reflect the full scope of congressional power". Joint Brief for Petitioners, p. 24 n. 29.

[15] Both *Cooper* and *Georgia v. Evans* concerned former Section 7 of the Sherman Act, repealed in 1955, which is found in the opinion of the court below. *Pfizer Inc. v. Government of India*, 550 F.2d 396 at 398, n. 5 (8th Cir. 1976); Pet. App. at B-4.

Close on the heels of *Cooper*, the Court in *Georgia v. Evans*, 316 U.S. 159 (1942), held that the term "person" included the individual states of the United States, although they had not been specifically mentioned in the definitional section of the Act.[16]

The Court emphasized that *Cooper* did not hold "that the word 'person' abstractly considered, could not include a governmental body". 316 U.S. at 161. The Court said:

> The State of Georgia, unlike the United States, cannot prosecute violations of the Sherman Law. . . . If the State is not a "person" within §8, the Sherman Law leaves it without any redress for injuries resulting from practices outlawed by that Act.[17]
>
> . . . We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act. . . . Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word "person" in §7 as to exclude a State. 316 U.S. at 162-63.

In sum, the considerations which led to the ruling in *Cooper* were entirely lacking in *Georgia v. Evans*. The court, in consequence, found that the State of Georgia was a "person" under the Sherman Act, as there was no indication of a contrary Congressional intent to deprive domestic States of the civil damage remedy.

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[16] The definition of "person" in the Act, 15 U.S.C. §12, makes no reference to governmental entities of any type.

[17] In this regard foreign nations are in a position identical to that of the states. Foreign nations are totally without remedies when the illegal activities in U.S. foreign commerce are conducted within the United States and the defendants are not within the jurisdictional reach of the courts of the purchaser-nation.

Aided by this Court's previous attention to the statutory language and assessments of Congressional intent in both *Cooper* and *Georgia v. Evans*, the Court of Appeals for the Eighth Circuit, sitting *en banc*, concluded in the present case "that Congress intended other bodies politic, such as a foreign government, to enjoy the same right" to sue for damages. Foreign nations were thus properly found to be within the broad sweep of the term "any person" in Section 4 on the basis of an assessment of Congressional intent with respect to an entity (foreign state) which, like that considered in *Georgia v. Evans* (domestic state), had not been separately identified as included among potential plaintiffs in the definitional section of the Clayton Act.

IV. LEGISLATIVE ENVIRONMENTAL FACTORS CONFIRM THE CONCLUSION THAT CONGRESS UNDERSTOOD FOREIGN NATIONS TO BE WITHIN THE CONCEPT "PERSON".

The task of statutory construction presented in this case includes consideration of the legislative environment at the time of enactment of the statute.[18] In making that assessment, this Court has not in the past and should not now restrict its vision to any single source. Lack of express indications in the legislative history itself establishes, *not* an absence of Congressional intent on the issue presented, but simply that *one* of the indices of intent gives no answer.

As this Court observed in both *Cooper* and *Georgia v. Evans*:

[18] *Ohio v. Helvering*, 292 U.S. 360, 370 (1934); *Georgia v. Evans*, 316 U.S. 159, 161 (1942).

> The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law. *United States v. Cooper Corp.*, 312 U.S. 600, 604-5 (1941). *Georgia v. Evans*, 316 U.S. 159, 162 (1942).

With the present issue in the foreground, and insufficient guidance in the legislative history, it is helpful to review those other identified indicia of intent.

First, there can be no question concerning the *purpose* of the antitrust laws. They are designed to promote competition in interstate and foreign commerce by preventing anticompetitive acts and practices, by imposing sanctions on violators, and by providing means of redress to the victims of proscribed conduct. Since the statutory scheme leaves no doubt as to Congressional intent that the protection of competition includes commerce "with foreign nations", since redress to victims is a principal purpose of the scheme (and the specific purpose of Section 4), and since foreign nations purchasing commodities in international commerce have been, from the outset, among the potential victims of the practices which the antitrust laws were designed to prevent, it is wholly in accord with statutory purpose to conclude that Congress intended the term "person" in the phrase "any person who shall be injured" to include foreign nations.

Second, the *subject matter* of the antitrust laws is trade and commerce among the states of the United States and with foreign nations. Section 1 of the Sherman Act, 15 U.S.C. §1, prohibits "[e]*very* contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce

among the several States, *or with foreign nations . . .*". (emphasis added) Similarly, Section 2 of the Sherman Act proscribes monopolization of "*any part of* the trade or commerce among the several States, *or with foreign nations . . .*". (emphasis added) The definition of "commerce" in the Clayton Act, which immediately precedes the definition of the term "person", begins: " 'Commerce', as used herein, means trade or commerce among the several States *and with foreign nations . . .* ", (emphasis added) and contains further references to trade with a "foreign nation". 15 U.S.C. §12. It would simply contradict the obvious to suggest that the subject matter of the antitrust laws, and in particular the Clayton Act, does not encompass trade with foreign nations. Consideration of the applicable subject matter thus can only bolster the conclusion that the term "person" includes foreign nations among those granted a Clayton Act remedy.

Third, the *statutory context* described above forecloses any reasonable *in pari materia* reading of the term "person" in Section 4 to exclude foreign nations from those entitled to sue. Only a rigidly mechanical application of the Section 12 definition of "person"—precisely the approach eschewed by the Court in both *Cooper* and *Georgia v. Evans*—would permit the conclusion that foreign nations are not Clayton Act "persons".

It is important to recognize that the Section 12 definition of "person" does not purport to be exclusive. Had Congress intended to present an exhaustive listing of potential plaintiffs, the formulation used in the preceding definition was readily available. Congress did not, however say " 'person' . . . means", preferring " 'person' . . . *shall be deemed to include. . .*". See *Helvering v. Morgan's Inc.*, 293 U.S. 121 (1934).

As the Court of Appeals observed in the present case on the subject of statutory context, in distinguishing the *Cooper* situation in which the separate provisions relating to the United States government supported the conclusion that it was not a "person", "no other provisions of the Act support the contention that Congress intended to exclude foreign nations". 550 F.2d at 399; Pet. App. at B-7.

Fourth, in the broader *context* of enactment of the language at issue, it should be recalled that petitioners acknowledge that Congress was aware, prior to 1914, of judicial decisions recognizing foreign governments as juristic persons,[19] a concept then firmly rooted in American law. *Cotton v. United States*, 52 U.S. (11 How.) 229 (1850); *The Sapphire*, 78 U.S. 164 (1870); and later, *French Republic v. Saratoga Vichy Co.*, 191 U.S. 427 (1903).

Petitioners prefer to claim that such Congressional awareness precipitated a conscious decision to omit foreign governments from an 1874 general statute defining terms. Act of June 22, 1874, 18 Stat., pt. 1, 1092. The argument, however, makes nonsense of *Georgia v. Evans*, 316 U.S. 159 (1942), as it requires the conclusion that Congress also intended to ex-

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[19] "Congress was indeed aware, as respondents suggest (Opp. Br. 8), that our courts had sometimes described governments as 'artificial' persons entitled to vindicate their property rights in court." Petitioners' Joint Reply Brief in Support of Their Petition for a Writ of Certiorari, p. 5.

Petitioners also note that the "authors of the Sherman Act had a wide acquaintance with the precedents of this Court, scores of which were cited in the antitrust debates of 1889-90". Petition for a Writ of Certiorari, p. 14, citing BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS, S. DOC. NO. 147, 57th Cong., 2d Sess. ix-xi (1903).

Petitioners elsewhere state: "As 'veteran teachers and practicers of law,' specially chosen to give the Senate the best legal advice possible, the (Senate Judiciary) Committee were undoubtedly aware that the question had already arisen whether the term 'person' might include governments as well as corporations." Joint Brief for Petitioners, p. 18.

clude domestic States from the term "person" as defined in that statute. Fortunately, this Court has not adopted petitioners' wooden approach, considering instead the full set of legislative environmental factors which may indicate the intent of Congress on the issue presented. Petitioners' narrow view, moreover, would exclude from those entitled to sue all entities not specifically mentioned in both Section 12 of the Clayton Act and the general interpretive statute. This view would eliminate, not only domestic States, but municipalities[20] and state governmental units[21] that have been recognized as proper antitrust plaintiffs in numerous actions brought under Section 4 of the Clayton Act. The general interpretive statute should give the Court no more pause on the question here presented than it gave the Court in its consideration of the issues in *Cooper* and *Georgia v. Evans*.

Finally, no quandary surrounds the *executive interpretation* of the statute. The United States has consistently expressed the view that the term "person" in Section 4 of the Clayton Act properly includes foreign nations. The Executive Branch reading of the statute has been expressed in participation as an *amicus curiae* supporting the position of the foreign nations in the District Court, in the Court of Appeals, and, more recently, in its memorandum requesting denial of the Petition for a Writ of Certiorari.[22]

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[20] *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23 (6th Cir. 1903), aff'd., 203 U.S. 390 (1906).

[21] See, e.g., *Hawaii v. Standard Oil Company of California*, 405 U.S. 251 (1972); *Illinois v. Harper & Row Publishers, Inc.*, 301 F.Supp. 484 (N.D. Ill. 1969).

[22] Memorandum for the United States as *Amicus Curiae*—on Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Supreme Court File No. 76-749; Brief for the United States as *Amicus Curiae*. File Nos. 74-1680 and 76-1064, Court of Appeals for the Eighth Circuit; see also reference to the *amicus* brief filed in *State of Kuwait v. Pfizer Inc., et al.*, 333 F. Supp. 315 (D. Minn. 1971).

A review of the available indicia of Congressional intent, previously identified by this Court as proper aids to construction, compels the conclusion that "person" as used by Congress in Section 4 of the Clayton Act includes foreign nations. Just as domestic states, though not expressly mentioned as *included* in the Section 12 definition of "person", were found to be included with the scope of the same term in Section 4, the legislative environmental factors militate compellingly in favor of the conclusion that Congress intended the term "person" also to include foreign nations among those entitled to sue.

CONCLUSION

Consonant with the remedial purpose of Section 4 of the Clayton Act, the available indicia of Congressional intent, and the previous assessments of Congressional intent made by this Court on related questions in *Cooper* and *Georgia v. Evans*, the courts below correctly determined that the term "person" includes foreign nations among those entitled to seek redress of antitrust injury under the Clayton Act.

To adopt the exception to the protective scope of Section 4 being urged by petitioners would leave foreign nations exposed to potential antitrust liability in their international commercial activities[23] while denying them the complementary remedy. That result portends assymetrical and inconsistent applications of the United States antitrust laws, violative of treaty commitments and otherwise potentially embarrassing to the United States. Foreign nations purchasing goods in international commerce should properly be accorded remedies congruent with those accorded other juristic "persons".

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[23] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1602, *et seq.*

Finally, standing to sue is not equivalent to entry of judgment. As Clayton Act "persons", foreign nations are no further than the starting blocks. Only if they clear all the hurdles to satisfactory proof of antitrust liability and damages will they will entitled to recovery. Surely to permit foreign nations, having no practicable remedy in their own courts for antitrust violations directed from within the United States, to attempt to establish the elements of a successful antitrust claim in United States courts is preferable to referring them to an unknown variety of retributive measures, such as tariff barriers and withdrawals of business licenses, which in the end may be seriously detrimental to foreign investments and sales of United States enterprises.

For all of the foregoing reasons, the *en banc* decision of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

PAUL C. SPRENGER
ERIC L. OLSON
Attorneys for Amicus Curiae
Federal Republic of Germany